MSS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 116 OF 1996

MARUTI @ MHALINGA BHIVA CHOUGULE)
R/o Arjunwada,Taluka Radhanagari)
Dist. Kolhapur) APPELLANT
(Org.Accused 2)

VERSUS

THE STATE OF MAHARASHTRA) RESPONDENT

Mr. S. A. Ingawale for appellant

Smt. V. R. Bhosale, APP

CORAM: **SMT. RANJANA DESAI, J.**

DATE: OCTOBER 15, 2007.

ORAL JUDGMENT:

. The appellant is original accused 2. He was tried along with three others i.e. original accused 1,3 and 4 in the court of the Additional Sessions Judge at Kolhapur, in Sessions Case No. 165 of 1993 for offences punishable under Section 302 r/w 34 and 324 r/w 34 of the Indian Penal Code for committing murder of Shivaji and voluntarily causing hurt to PW 9 Sanjay @ Sarjerao, PW 8 Ramchandra, Raghunath Yadav and Bapu Yadav by means of sticks, axes and giving them kick blows all in

furtherance of their common intention. By the impugned judgment and order the learned Sessions Judge acquitted accused 1 Bajirao, accused 3 Balwant and accused 4 Pandurang of offence under Section 302 read with 34. All the accused were acquitted of offences under Section 323 read with 34 and Section 324 read with 34 of the Indian Penal Code. Accused 2 Maruti was found guilty of offence under Section 304 Part II of the Indian Penal Code. He was sentenced to undergo RI for seven years. Being aggrieved by the said conviction and sentence accused 2 has preferred this appeal. For the sake of convenience I shall refer to the accused as per their description in the trial court.

2. It would be advantageous to begin with the facts of the case. The fields of accused 1 and 2 are situated at the South-East corner field of Gat No. 633 which belongs to the complainant i.e. PW 4 Rajaram. The fields of accused 1 and 2 adjoin the field of PW 4 Rajaram and his brother. There are trees on the boundaries of the fields. The case of the prosecution is that dry leaves of the said trees which fall in the field of accused 4 Bajirao and accused 2 Maruti cause damage to their field. Therefore, they repeatedly insisted that PW

4 Rajaram and others should cut the trees but they did not cut them.

3. On 22/4/93 in the evening Hirabai, the mother of Bajirao collected the dry leaves. She put them around stem of one tree and set them on fire. Indubai wife of PW 4 Rajaram removed the burning leaves because the tree was likely to get burnt. There was quarrel between Indubai and Hirabai.

4. Deceased Shivaji was working as a truck driver in Bidri Co-operative Sugar Factory. At 6 p.m. on the same day i.e. on 22/4/93 he was coming home from factory through his field Gat No. 633. Accused 2,3 and 4 came thereafter. There was exchange of words between the accused and Shivaji. Accused 1 slapped the deceased on his face. The deceased fell in the groundnut crop. He raised a cry. Accused 2 gave two axe blows on the head of Shivaji. Accused 1,3 and 4 dealt kicks and fist blows to the deceased and PW 4 Rajaram. By the time Bapu Ramchandra and Bacharam came there. They were assaulted and they sustained injuries. Ramchandra and others took the deceased to CPR Hospital, Kolhapur, where he was declared dead.

5. On 22/4/93 at about 8-30 p.m. PW 10 Head Constable Shinde received information about receipt of dead body of Shivaji from Medical Officer in CPR Hospital, Kolhapur. PW 4 Rajaram lodged his FIR which is at Exh.-23. On the basis of FIR the investigation was set into motion. After completion of the investigation the accused came to be charged as aforesaid.

6. In support of its case the prosecution examined 14 witnesses. The prosecution story is unfolded by PW 4 Rajaram Laxman Yadav, PW 5 Ganpati Tukaram Chougule, PW 6 Satappa Dattu Sabale, PW 8 Ramchandra Shivaji Yadav and PW 9 Sanjay Shivaji Yadav.

7. PW 7 Dr. Ravindra Dattatray Khot has proved the post-mortem notes of Shivaji. He has also deposed about the injuries sustained by accused 1 and 2. PW 14 Dr. Madhukar Pandurang Kamble has produced medical case papers of PW 8 Ramchandra Yadav, PW 9 Sanjay Yadav and Bapu. The details of investigation have been given by PW 10 Shankar Baburao Shinde, Police Head Constable, PW 11 ASI Ramchandra Bandu Bhivate, PW 12 ASI Jaysing Rangrao Patil and PW 13 PI Baburao Dhondi Patil.

8. Accused 1 filed written statement in which he stated that when he and Maruti went to make inquiry with the complainant PW 4 Rajaram, Rajaram and his people attacked them. At that time PW 9 Sanjay wanted to attack accused Bapu with a bar. By mistake the bar hit on the head of deceased Shivaji. This defence is also suggested in the cross-examination of the prosecution witnesses.

9. After perusing the evidence on record the learned Sessions Judge convicted accused 2 as aforesaid and acquitted rest of the accused. Hence this appeal by accused 2.

10. I have heard Mr. Ingawale, the learned counsel appearing for the accused. He submitted that the learned Additional Sessions Judge erred in convicting accused 2. He submitted that the learned Sessions Judge has disbelieved the prosecution evidence so far as it pertains to alleged involvement of accused 1, 3 and 4 is concerned and, therefore, it is clear that the prosecution has concocted its case as regards the other accused. He submitted that, the learned Sessions Judge should not have believed the

prosecution evidence so far as it pertains to the alleged involvement of accused 1. Mr. Ingawale pointed out that the learned Sessions Judge has disbelieved alleged discovery of axe and seizure of clothes and other articles. Therefore, major portion of the prosecution story has been disbelieved by the learned Sessions Judge. In the circumstances he could not have convicted accused 2 on the basis of rest of the evidence. He submitted that the entire evidence adduced by the prosecution is tainted evidence. Mr. Ingawale further submitted that the prosecution has led evidence of interested witnesses. Not a single independent witness is examined. Possibility of false implication, therefore, cannot be ruled out. Mr. Ingawale drew my attention to the evidence of PW 7 Dr. Khot. He submitted that Dr. Khot has stated that injuries suffered by the deceased could not have been caused by means of axe Article No. 15 shown to him. He has stated that it can be caused by the blunt side of the edge of the axe. Mr. Ingawale submitted that according to Dr. Khot the length of the back portion of the edge of the axe is one inch. According to Dr. Khot if the blow is dealt directly and only back portion of the axe hits the body, the wound would be of one inch

length. Mr. Ingawale submitted that the injury received by the deceased is described as 6" x 12" bone deep. Such an injury is not possible by the blunt edge of the axe. This is evident from doctor's evidence.

11. Mr. Ingawale pointed out that the prosecution witnesses have stated that accused 2 dealt two axe blows on the head of the deceased. However, there is only one injury on the deceased. Therefore, prosecution witnesses are not telling the truth. Injuries suffered by the deceased could not be said to have been caused by accused 2.

12. Mr. Ingawale then drew my attention to the injuries sustained by accused 1 and 2, particulars of which have been given by PW 7 Dr. Khot. He contended that accused 1 has received as many as 13 injuries and accused 2 has received 3 injuries. Dr. Khot has stated that the said injuries are dangerous to life. Relying on the judgments of the Supreme Court in **Mohar Rai v. The State of Bihar, AIR 1968 SC 1281** and **Lakshmi Singh & Ors. v. State of Bihar, AIR 1976 SC 2263**, Mr. Ingawale contended that non-explanation of the injuries sustained by the accused indicates that the

prosecution has suppressed the genesis of the case. He submitted that accused 2 must, therefore, be acquitted.

13. Mr. Ingawale further pointed out that the defence has suggested that PW 9 wanted to attack accused 1 with a bar and by mistake the bar landed on the head of the deceased. He submitted that blood group of the deceased is found on the iron bar and, therefore, the prosecution has probabalised the defence. Mr. Ingawale submitted that in the circumstances the order of conviction and sentence of accused 2 be set aside and accused 2 be acquitted.

14. Mrs. Bhosale, the learned APP on the other hand submitted that the prosecution has proved its case beyond reasonable doubt. She submitted that all the prosecution witnesses are consistent about attack made by accused 2 on the head of the deceased. It is also supported by the medical evidence. The learned APP urged that merely because some part of the prosecution story is not believed the entire case of the prosecution need not be discarded. The court can always rely upon that part of the prosecution story which is found

to be established on the basis of cogent evidence. Witnesses can be partly believed. The learned APP submitted that this is not a case where the prosecution has not explained the injuries sustained by the accused. A counter case is registered against the accused and the prosecution witnesses have referred to the fact that the accused were also attacked by the complainant's people.

15. Mrs. Bhosale submitted that in any event it is not the rule that in all cases where prosecution has not explained injuries on the accused it is fatal to the prosecution case. If otherwise clear, cogent and trustworthy evidence is available the accused can still be convicted. In support of this submission, the learned APP relied on **Rajender Singh & Ors. v. State of Bihar, (2000) 4 SCC 298** and **Takhaji Hiraji v. Thakore Kubersing Chamansing & Ors, (2001) 6 SCC 145** and **Raghunath v. State of Haryana & Anr., (2003) 1 SCC 398**. She also relied on **Ram Sunder Yadav & Ors. v. State of Bihar, (1998) 7 SCC 365**. The learned APP contended that in the circumstances, the conviction and sentence be confirmed.

16. It is true that the learned Sessions Judge has not believed the prosecution case so far as it pertains to alleged involvement of accused 1, 3 and 4. However, merely because evidence pertaining to the involvement of these accused has not impressed the learned Sessions Judge, the other evidence which makes out the involvement of accused 2 cannot be discarded. In such case the duty of the court is to evaluate the rest of the evidence carefully and, if it is found to be cogent and consistent, it can always be relied upon. It is common knowledge that the witnesses always exaggerate their case but if after obliterating that exaggeration the core of the evidence is found to be consistent, the conviction can be based on it. In this connection reliance placed by the learned Sessions Judge on the judgment of the Supreme Court in **Appabhai v. State of Gujarat, AIR 1988 SC 696**, is apt.

17. It is, therefore, necessary to see whether conviction can be sustained on the basis of evidence adduced by the prosecution which relates to accused 2. It is a fact that field of the accused adjoins the field of PW 4 Rajaram and his brother. It appears that there was some dispute between the two sides in respect of falling of

leaves of the trees standing on the boundary between the two fields, in the field of accused 1 and 2. The incident in question preceded by a quarrel between Hirabai, the mother of accused 1 Bajirao and Indubai, the wife of PW 4 Rajaram in respect of the falling of leaves.

18. According to the prosecution deceased Shivaji was working as a driver in Bidri Co-operative Sugar factory. On the relevant day at about 5-30 to 5-40 p.m. he was coming from the side of Arjunwada Phata, PW 4 Rajaram was in Gat No. 633 known as Palak which admittedly belongs to PW 4 Rajaram and his brothers. He was watering sugar-cane crop. He saw accused 1 approaching. He was behind the deceased. Accused 2,3 and 4 also came thereafter. There was exchange of words between them. Accused 1 Bajirao gave slap on the face of the deceased. The deceased fell in the groundnut crop. He raised a cry. Accused 2 dealt two axe blows on the head of Shivaji. Accused 1,3 and 4 dealt kick and fist blows to PW 4 Rajaram and Shivaji, the deceased. By that time boys from PW 4 Rajaram’s side came there. According to PW 4 Rajaram, Bapu Yadav, Ramchandra Yadav and son of deceased Bacharam sustained injuries. According to him boys from

their side also assaulted the accused. Some villagers came there. They intervened. The accused ran away. He brought a tempo. The deceased was taken to CPR Hospital where he was declared dead. PW 4 Rajaram then lodged his F.I.R. which is at Exh.-23.

19. PW 4 has been cross-examined at great length. He has categorically denied prosecution case that the deceased dealt blows on the head of Bajirao and Maruti by means of iron bar and that he dealt blows with axe on the head of Maruti and that all of them assaulted Bajirao and Maruti with axe and shovel. He has denied that when Sanjay was dealing a blow with a bar to accused 1, accused 1 leaned, the bar landed on the head of the deceased and the deceased was injured due to that blow. The defence has not been able to make any dent in this evidence in the cross-examination. The evidence of this witness, so far as it pertains to involvement of the other accused might have been discarded by the learned Sessions Judge because of inconsistency but so far as attack on the deceased is concerned, it is consistent. He has not tried to suppress the fact that the accused were also assaulted by the boys from his side. He has categorically made this

statement in his examination-in-chief. In the cross-examination he has stated that Bajirao might have sustained 12 injuries and Maruti might have sustained three injuries. He has further admitted that a Sessions Case is pending against him, Ramchandra, Bapu, Raghunath and Sanjay for attempting to murder Bajirao and Maruti. Therefore, it would be wrong to say that this witness has attempted to suppress injuries received by the accused or that any case was pending against him in respect thereof.

20. It was argued that his evidence to the effect that accused 2 dealt two axe blows on the deceased is falsified by the fact that there is only one injury on the head of the deceased. In fact this is a criticism against all the prosecution witnesses who have referred to two axe blows having been dealt by accused 2. However, I find no substance in this criticism.

21. PW 7 Dr. Khot has described the injuries sustained by the deceased as follows:

"1. Contused lacerated wound on left parietal region 6" x 12 bone deep. Clinically there was

depressed fracture of parieto occipital bone."

He has stated that if two blows are received at the same point the above injury can be caused. Therefore, it cannot be said that there is any inconsistency between the medical evidence and the eye-witness account as regards the number of blows.

22. The prosecution has examined PW 5 Ganpati Chougule. He is an eye witness. He has stated that on the date of incident he was returning from his field at about 5-30 to 5-45 p.m. He saw the deceased and accused 1 and 2 pushing each other. According to him all the three fell in the field of PW 4 Rajaram. Accused 1 slapped the deceased on his face. The deceased fell down. When deceased got up accused 2 dealt two axe blows on the head of the deceased. The deceased fell down injured. He has stated that Rajaram, Bapu, Raghu and all Yadhavs were present there. Satappa Sable was also there.

23. It is pertinent to note that he has said that there was incident of beating between the two groups. According to him Sanjay brought water. He put water in the mouth of the deceased. The

deceased became unconscious. Undoubtedly he has not stated in his police statement that the deceased got up after receiving a slap from accused 1. He has also not stated that deceased received two axe blows. In his police statement there is a reference only to one blow. But there are no major omissions. I do not find any material omission or contradiction in the evidence of this witness which can persuade me to discard his evidence so far as involvement of accused 2 is concerned. His evidence corroborates the evidence of PW 4 Rajaram.

24. PW 6 Satappa Sable is also an eye-witness. According to him accused 1,3 and 4 were holding the deceased and accused 2 dealt axe blow on the head of the deceased. There can be no dispute that this witness has for the first time said in the court that accused 1,3 and 4 were holding the deceased but he is consistent about the fact that accused 2 dealt axe blow on the head of the deceased.

25. PW 8 Ramchandra Yadav is an injured eye-witness. He is the son of the deceased. He is a nephew of PW 4 Rajaram. According to him on 22/4/93 he was present in his field at 5-30 to 6 p.m. He saw his father coming by pedestrian way.

He heard his cry. He went running towards him. All the accused were present near his father. Accused 2 dealt two axe blows on the head of his father. His father fell down. Accused 1, 3 and 4 gave kicks and fist blows to his father. By the time his uncle Rajaram and his cousins came near his father. Accused 1, 3 and 4 dealt kicks and fist blows to Rajaram. When he was near his father accused 2 dealt a blow with the back of the axe on his head. Sanjay and Bapu were also assaulted at that time. His father was then taken to the hospital. According to him Sanjay and Bapu also had injuries. They were examined at Radhanagari on 23/4/93. In his cross-examination he is consistent about the attack made on his father by accused 2. He has denied that when Sanjay was assaulting accused 1 with iron bar accused 1 leaned forward and the bar hit on the head of the deceased.

26. PW 9 Sanjay is also the son of the deceased. He was also present in their field when the incident took place. According to him he saw accused 1 and 2 talking to the deceased on the pedestrian way. There was exchange of words between the two sides. His father raised a cry and hence he went running towards him. He saw accused

1 giving slap on the face of the deceased. The deceased fell down. Accused 2 dealt axe blows on the head of the deceased. Accused 1 to 4 were dealing kicks and fist blows to the deceased. According to him accused 2 also assaulted him, Bapu, Ramchandra and Rajaram. Thereafter the accused ran away. He has spoken about the presence of PW 5 Ganpati and PW 8 Satappa. He has stated that he sustained injuries near his right ankle. No major omissions or contradictions have been brought on record in his cross-examination.

27. Mr. Ingawale drew my attention to the statement made by this witness in the cross-examination. In the cross-examination he has stated that he did not remember whether there were injuries on the person of Bapurao and Maruti when they started running away. It is true that he has denied the prosecution case that they assaulted the accused but from this it can be said that he cannot be relied upon. He has no reason to falsely implicate an innocent person as an assailant of his father. So far as the attack on the deceased is concerned, I find no difficulty in accepting his evidence.

28. Evidence of all these eye-witnesses categorically establishes that it is accused 2 who dealt axe blows on the deceased. I have already referred to the evidence of Dr. Khot. Dr. Khot's evidence makes it clear that if two blows are dealt with an axe at the same place, the injury which is received by the deceased can be caused.

29. So far as submission of Mr. Ingawale that considering the dimension of the injury, the evidence of Dr. Khot that this injury was caused by the blunt side of the axe and considering the length of the blunt side of the axe, the injury sustained by the accused cannot be caused by it is concerned, I am of the opinion that this submission cannot be accepted. When the witnesses categorically state that it is accused 2 who assaulted the deceased with an axe, that evidence will override the medical evidence. On the basis of dimension of the injury and the length of the back portion of the axe, it cannot be said that such injury was not caused at all by it. This submission is, therefore, rejected.

30. It was argued that the learned Judge has disbelieved the evidence of discovery of axe and

consequently alleged finding of bloodstains on axe and, therefore, the story that accused 2 assaulted the deceased cannot be said to have been proved. This submission is also not acceptable. Merely because the evidence pertaining to discovery of axe is not accepted by the learned Sessions Judge, it cannot be said that eye-witness account must be discarded. In this case the evidence of the prosecution witness as regards the injury sustained by the deceased is cogent and reliable. The fact that discovery of axe is disbelieved, therefore, does not adversely affect the prosecution case.

31. It was strenuously contended by Mr. Ingawale relying on the judgment of the Supreme Court in **Mohar Rai's case (supra)** and **Lakshmi Singh's case (supra)** that since the prosecution has not explained the injuries sustained by the accused it has suppressed the genesis and the origin of the occurrence and, therefore, defence version is rendered probable. There can be no dispute that in some cases such inference can be drawn. However, in the facts of this case it is not possible for me to hold that injuries sustained by the accused have not been explained by the prosecution. The fact that another counter case is registered in which

the prosecution witnesses are the accused is admitted by PW 4 Rajaram. He has stated that in that sessions case he, Ramchandra, Bapu, Raghu and Sanjay are charged with offence of attempt to commit murder of Bapurao and Ramji. He has also stated that boys from their side also assaulted the accused. The prosecution has thus kept the other sessions case in the forefront. PI Patil has in his evidence clearly referred to the counter case, therefore,it is clear that the accused received the injuries when some of the prosecution witnesses attacked them.

32. It is pertinent to note that it is the accused who went to the field of the prosecution witnesses. Two of the prosecution witnesses i.e. PW 4 Rajaram and PW 8 Ramchandra are injured witnesses. Inasmuch as the prosecution has explained as to how the accused received injuries, the judgments of the Supreme Court in **Mohar Rai's case (supra)** and **Lakshmi Singh's case (supra)** are not applicable to the facts of the present case. On the basis of the evidence led by the prosecution, therefore, I have no hesitation in holding that accused 2 has dealt axe blows on the deceased. The conviction of the accused is, therefore, well founded.

33. The learned judge has convicted accused 2 for offence under Section 304 Part II. He has sentenced him to RI for 7 years. The learned Judge has observed and, in my opinion, rightly so that the deceased was assaulted with blunt edge of the axe. He has observed that since there was only one weapon there was no intention to kill any one. He has also stated that however, since the attack was made on the head of the deceased accused 2 must have knowledge that it was likely to cause death. He has, therefore, sentenced accused 2 to 7 years RI.

34. The incident is dated 22/4/93. About 14 years have passed by. In this case serious injuries have been received by the members belonging to the complainant's side. Accused 1 Bajirao has received 13 injuries and accused 2 Maruti has also received 3 injuries and according to Dr. Khot they were dangerous to life.

35. I am informed by the learned counsel appearing for the appellant and the learned counsel who is appearing for the appellants in the counter appeal i.e. for the accused in the counter case who are

prosecution witnesses here that the accused and the prosecution witnesses are neighbours and peace is prevailing in the area. In the peculiar facts and circumstances, therefore, sending the accused to jail after a period of 14 years is not proper. Since peace is prevailing in the area sending accused 2 to jail may be counter productive. According to the learned counsel it may give rise to disturbance of peace. Some untoward incident may take place.

36. Under Section 304 Part II the accused can be sentenced for a term which may extend to 10 years or with fine or with both. While confirming the sentence, I am of the opinion that accused 2 should be sentenced for the period of imprisonment which is already undergone by him and with fine of Rs.25,000/-. Out of the fine amount, a sum of Rs.20,000/- must be paid to the widow and if the widow is dead, to the heirs of the deceased. In default of payment of fine, however, the accused will have to undergo RI for two years and six months. Hence the following order:

. "The conviction and sentence of accused 2 Maruti under Section 304 Part-II is confirmed. However,

order sentencing him to RI for 7 years is set aside. Instead the period already undergone by him is treated as sentence for the said offence.

. Accused 2 is also sentenced to pay fine of Rs.25,000/-. In default of payment of fine the accused will have to undergo RI for two years and six months. Out of the fine amount, an amount of Rs.20,000/- be given to the widow of deceased Shivaji and if the widow is not alive to her heirs. Fine amount be paid within twelve weeks from today.

. The fine amount be deposited in the Sessions Court and the Sessions Court will ensure that Rs.25,000/- is disbursed as stated in this order.

. Appeal is disposed of.
. Office to issue authenticated copy.
. Parties to act on authenticated copy.

JUDGE.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 116 OF 1996

MARUTI @ MHALINGA SHIVA CHOUGULE.. APPELLANT

VERSUS

THE STATE OF MAHARASHTRA .. RESPONDENT

Mr. S. A. Ingawale for appellant

Smt. V. R. Bhosale, APP

CORAM: **SMT. RANJANA DESAI, J.**

DATE: OCTOBER 15, 2007.

OPERATIVE PART OF THE ORDER

. For the reasons stated in the oral judgment, this court has disposed of the appeal by passing following order:

. "The conviction and sentence of accused 2 Maruti under Section 304 Part-II is confirmed. However, order sentencing him to RI for 7 years is set aside. Instead the period already undergone by him is treated as sentence for the said offence.

. Accused 2 is also sentenced to pay fine of Rs.25,000/-. In default of payment of fine the accused will have to undergo RI for two years and six months. Out of the fine amount, an amount of Rs.20,000/- be given to the widow of deceased Shivaji and if the widow is not alive to her heirs.

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JUDGE.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 116 OF 1996

DATE OF DECISION:15/10/2007

Submitted for
approval.

THE HON'BLE (SMT.) JUSTICE RANJANA DESAI:

THE HON'BLE SHRI JUSTICE :

1. Whether Reporters of Local Papers be allowed to see the Judgment?

2. To be referred to the Reporters or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur, Aurangabad and Goa Offices?